No. 01-694

In the Supreme Court of the United States

STERLING CONSULTING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Declaratory Judgment Act, 28 U.S.C. 2201, and the Anti-Injunction Act, 26 U.S.C. 7421, preclude the district court in a receivership proceeding from enjoining the Internal Revenue Service from making tax determinations within the time periods permitted by applicable law and permit the district court to determine tax liabilities outside of that statutory framework.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-11a) is reported at 245 F.3d 1161. The orders of the district court (Pet. App. 12a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2001. A petition for rehearing and rehearing en banc was denied on August 7, 2001. The petition for a writ of certiorari was filed on November 5, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In April 1995, Eller Industries, Inc., a Colorado corporation, brought this receivership action in the

United States District Court for the District of Colorado against Indian Motorcycle Manufacturing, Inc. (IMMI), a New Mexico corporation. The district court appointed petitioner as the receiver. IMMI was one of several companies embroiled in a dispute over the "Indian Motorcycle" trademark. Three other unrelated companies involved in the dispute, Indian Motocycle Company, Inc., Indian Motocycle Apparel & Accessories, Inc., and Indian Motocycle Manufacturing, Inc. (hereinafter referred to as the debtor corporations), have been in bankruptcy in Massachusetts since before 1995. Pet. App. 2a-3a.

In late 1995, petitioner, acting as receiver for IMMI, acquired all of the stock of the three debtor corporations and another corporation, Indian Motor Company (Motor), from Michael Mandelman. In 1997, the United States intervened in this action to enforce federal tax liens for individual income taxes owed by Mandelman against a forthcoming distribution to Michelle Lean, whom the United States contended was Mandelman's nominee. In 1999, the assets of the receivership estate of IMMI and the bankruptcy estates of the debtor corporations were jointly sold, and $3.5 million of the proceeds from the sale was allocated to the bankruptcy estates. Pet. App. 3a.

2. In October 1999, petitioner filed a motion with the district court in Colorado asking that court to determine that the debtor corporations owed no additional federal taxes above those shown on their tax returns for 1999. The government opposed the motion on the ground that the district court in Colorado lacked jurisdiction to determine the tax liabilities of debtors that were in bankruptcy in Massachusetts. Pet. App. 3a.

3. In December 1999, the bankruptcy trustee for the debtor corporations' bankruptcy estates filed an emergency motion in the Massachusetts Bankruptcy Court seeking approval of his final accounts and distribution of the estates. The government objected to the motion and distribution. During the hearing on the motion, the government indicated that the tax liabilities of the three debtor corporations for 1999 would amount to $1.2 million if the top corporate tax rate was applied to the $3.5 million allocated to the bankruptcy estates from the sale of the combined estates. It further indicated that the escrow of $437,000 proposed by petitioner and the bankruptcy trustee to cover the potential tax liabilities of the debtor corporations was insufficient. Pet. App. 3a-4a.

The bankruptcy court entered an order approving the trustee's amended final accounts. In its order, the bankruptcy court purported to "cede jurisdiction of the determination of the Bankruptcy Estates [sic] tax liabilities to the [district court in Colorado]." Pet. App. 4a. The bankruptcy court ordered that $1.2 million be disbursed from the bankruptcy estates to petitioner as "escrow agent" and that petitioner hold the money for the purpose of covering the potential 1999 tax liabilities of the debtors and distributing the balance to bankruptcy creditors. *Ibid.*

The government appealed the bankruptcy court's order to the Bankruptcy Appellate Panel for the First Circuit. Pet. App. 4a. The Bankruptcy Appellate Panel held that the bankruptcy court erred in ceding jurisdiction to the federal district court in Colorado, and reversed the bankruptcy court's order that distributed the $1.2 million to petitioner as escrow agent and capped the debtors' tax liabilities at $1.2 million.

United States v. *Sterling Consulting Corp. (In re Indian Motocycle Co.)*, 261 B.R. 800 (BAP 1st Cir. 2001).

4. In the meantime, petitioner's motion in the Colorado district court regarding the debtor-corporations' 1999 income tax liabilities was referred to a magistrate judge. In January 2000, the magistrate overruled the government's jurisdictional objections and ordered the government to respond to the merits of petitioner's motion. On March 20, 2000, the district court adopted the magistrate's report and held that its jurisdiction over all matters affecting the receivership estate included the jurisdiction to determine the tax liabilities of the debtor corporations. The court further ruled that it had jurisdiction to determine those liabilities under 28 U.S.C. 1334(a), which confers upon the district courts "original and exclusive jurisdiction of all cases under title 11," and 28 U.S.C. 1334(b), which confers upon the district courts "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Pet. App. 4a.

Petitioner filed a motion in the Colorado district court asking it to determine that IMMI and Motor owed no additional federal taxes beyond the amount set forth in their tax returns for certain years. The government opposed the motion on jurisdictional grounds, but the magistrate determined that the court had jurisdiction to determine IMMI's and Motor's tax liabilities. The magistrate ordered the IRS to address the merits of IMMI's and Motor's tax returns by August 31, 2000, and to address the merits of the 1999 tax returns for the debtor corporations by July 1, 2000. The magistrate further ordered that, in the event the IRS failed to comply with the court's order, "the [tax] returns shall be deemed to have been completed correctly, and the estates shall be deemed to owe no further taxes." The

government objected to the magistrate's order. Pet. App. 5a.

5. On July 19, 2000, the district court overruled the government's objections and affirmed the magistrate's order. It extended until August 31, 2000, however, the deadline by which the IRS was to address the merits of the debtor corporations' tax liabilities. In its order, the district court stated that whether it had jurisdiction over the tax liability determinations for entities within the receivership estate was a controlling question of law as to which there was substantial ground for a difference of opinion.[1] In a separate order entered the same day, the district court also certified the question whether it had the authority to set enforceable deadlines for such tax determinations. The court concluded that an immediate appeal of these questions would advance the ultimate termination of the case, thereby satisfying the conditions of 28 U.S.C. 1292(b). Pet. App. 5a.

6. The United States petitioned the Tenth Circuit for interlocutory review. The court of appeals granted the petition and stayed the district court orders pending appeal. Pet. App. 5a.

On the merits, the court of appeals held that the Declaratory Judgment Act, 28 U.S.C. 2201(a), prohibits the district court from determining corporate tax liabilities in a receivership action. The court of appeals further held that the Anti-Injunction Act, 26 U.S.C. 7421, bars the district court from enjoining the IRS from assessing and collecting taxes for failure to evaluate tax returns by the deadline imposed by the district court in this case. Pet. App. 2a.

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[1] The district court appeared to include the three debtor corporations and Motor in its reference to the "receivership estate."

With respect to the determination of tax liabilities, the court of appeals noted that the Declaratory Judgment Act empowers courts to "declare the rights and other legal relations of any interested party seeking such a declaration." 28 U.S.C. 2201(a). That grant of authority, however, explicitly excludes cases "with respect to Federal taxes." *Ibid.* The court therefore concluded (Pet. App. 6a-7a) (citation omitted):

> In its motions to the district court regarding the tax liabilities of the five corporations, the receiver requests relief that the Declaratory Judgment Act specifically prohibits the court from granting. Absent the application of an exception to the statutory prohibition, the Declaratory Judgment Act plainly bars the district court from declaring that the corporations in question owe no additional federal taxes. To hold otherwise would impede the government's ability to assess and collect taxes.

The court of appeals also concluded that the injunction entered by the district court to prohibit the IRS from determining the tax liabilities of the five corporations after the court-imposed deadline was an improper attempt to enjoin the IRS from assessing and collecting taxes. The Anti-Injunction Act expressly provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. 7421(a). The court therefore concluded that the district court lacked jurisdiction to enjoin the IRS from assessing and collecting taxes for failure to expedite its determination of taxes in this case. Pet. App. 9a-10a.

Petitioner filed a petition for rehearing and for rehearing en banc. The petition was denied. Because

the appeal was interlocutory under 28 U.S.C. 1292(b), the proceedings in the district court have continued, as have those in the Massachusetts bankruptcy court on remand from the BAP judgment.[2]

ARGUMENT

The court of appeals held that the Declaratory Judgment Act bars the district court from determining that IMMI, Motor, and the debtor corporations owe no federal income taxes in excess of the amounts shown on their tax returns, and that the Anti-Injunction Act bars the district court from enjoining the IRS from assessing additional taxes against those corporations. The petition seeks review of the decision below only insofar as it relates to the tax liabilities of IMMI, the only corporation that is in receivership. Pet. 20 n. 14. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 7) that the decision of the court of appeals violates the constitutional separation of powers by allowing the executive branch to impinge on the function of the judiciary. In making this assertion, petitioner claims that the court of appeals impermissibly curtailed the district court's inherent powers in receivership actions.

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[2] Petitioner has filed a request under 26 U.S.C. 6501(d) for an expedited examination of IMMI's and Motor's tax returns. Petitioner was recently provided by government counsel with a nearly completed draft examination report prepared by the revenue agent, proposing to assess more than $2 million in taxes against IMMI for the fiscal year ended September 30, 1999, and was invited to indicate any factual errors in the report before the assessment is made.

"Under settled principles of sovereign immunity, the United States, as sovereign, is immune from suit, save as it consents to be sued." *United States* v. *Dalm*, 494 U.S. 596, 608 (1990) (internal quotation marks and citations omitted). The Court has "frequently held" that a waiver of sovereign immunity must be "unequivocally expressed in the statutory text" and that any such waiver "is to be strictly construed, in terms of its scope, in favor of the sovereign." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (citing cases). As the court of appeals observed, in enacting the Internal Revenue Code, Congress established a well-defined and circumscribed framework for the determination, and judicial review, of federal tax liabilities.[3] There is

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[3] See 26 U.S.C. 6201 (Congress has "authorized and required" the IRS to conduct examinations of tax liabilities), 6501(a) (IRS generally has three years from the date the taxpayer files a return to conduct an examination), 6212 (once the IRS determines an income tax deficiency, it is authorized to issue a notice of deficiency to the taxpayer), 6213 (taxpayer thereafter has 90 days in which to file a petition in the Tax Court and obtain a judicial review of its tax liability without having to pay any portion of the liability), 7422(a) (if the taxpayer fails to seek review in the Tax Court, then it may obtain a judicial review of its liabilities, after paying the tax in full, by filing an administrative claim for refund and filing a refund suit), 6532(a)(1) (refund suit may not be filed until the expiration of six months from the date of filing of the refund claim, unless the taxpayer has received a notice of disallowance before that time).

Moreover, Congress has enacted special rules that pertain to corporations in receivership. For example, Congress has provided that the IRS may immediately assess a tax liability against a taxpayer in receivership, even if a notice of deficiency has not been issued to the taxpayer, and that the IRS may file claims against taxpayers in receivership proceedings "for adjudication in accordance with law." 26 U.S.C. 6871(a), (c). Further, Congress has provided that if a dissolving corporation (including a corpora-

no express waiver of sovereign immunity in any statutory text that would confer upon the district court the authority to require the IRS to submit in this receivership proceeding a claim for the tax liabilities of certain corporations or be forever barred from asserting liabilities against them. And, as the court of appeals correctly held, the Declaratory Judgment and Anti-Injunction Acts expressly bar the relief that petitioner has sought. Pet. App. 6a-9a.

Petitioner incorrectly asserts (Pet. 10) that, by intervening in the receivership—an *in rem* proceeding—the government "intervened for all purposes related to the *res* and waived sovereign immunity for all purposes related to the *res*." This is the same argument that the Eighth Circuit recently characterized as a "broad overstatement [that] is seriously misleading." *Miller* v. *Tony & Susan Alamo Foundation*, 134 F.3d 910, 916 (8th Cir. 1998). When the United States intervenes in a suit, sovereign immunity still shields it from cross-claims and counterclaims, except in recoupment. In *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868), on which petitioner relies (Pet. 10 n.4), the Court made a distinction between *in personam* and *in rem* proceedings:

> [W]hen the United States institute a suit, they waive their exemption [from suit] so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libelled. They then stand in

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tion in receivership) files an appropriate request in writing, the IRS is to make an assessment of the corporation's tax liability within 18 months after receiving the request. 26 U.S.C. 6501(d).

> such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy.

Here, the United States did not intervene to assert a claim to the receivership corpus generally. Instead, the United States appeared only to enforce its tax lien against distributions to Michelle Lean, as the alleged nominee of Michael Mandelman. By reason of this intervention, the government must respond to arguments by other creditors that their claims to distributions payable *to Mandelman* are superior to the rights of the government. See *Carr* v. *United States*, 98 U.S. 433, 438 (1878) ("when the government itself seeks its rights at the hands of the court, equity requires that the rights of other parties interested in the subject matter should be protected"). By making such a claim, however, the government did not waive its sovereign immunity with respect to the determinations of the tax liabilities of the several corporations in question.

Petitioner also erroneously relies (Pet. 13-15) on the statement in *Riehle* v. *Margolies*, 279 U.S. 218, 223 (1929), that "[t]he appointment of a receiver of a debtor's property by a federal court confers upon it, regardless of citizenship and of the amount in controversy, federal jurisdiction to decide all questions incident to the preservation, collection and distribution of the assets." See also *Wabash Railroad* v. *Adelbert College*, 208 U.S. 38, 54 (1908) (quoted to similar effect at Pet. 15). But *Riehle* and *Wabash R.R.* did not involve claims against the federal government, and a waiver of sovereign immunity was thus not required. Moreover, those cases did not involve (and, in fact, predated) the

tax exception to the Declaratory Judgment Act. Regardless of the scope of federal court jurisdiction in receivership proceedings as a general matter, *Riehle* and *Wabash Railroad* thus do not establish jurisdiction in the district courts to truncate the statutory period for examining tax liabilities or to determine the tax liabilities of the corporations in this case.

Petitioner argues (Pet. 21) that the legislative history of the Declaratory Judgment Act does not indicate that the tax exception to that Act was intended to limit the broad powers of the courts in receivership proceedings. Petitioner asserts that, in the absence of an express reference to receivership proceedings, the tax exception to the Declaratory Judgment Act should not be given its ordinary meaning as applied to such proceedings. This argument is premised on the assumption that the general power of a receivership court would permit it to resolve tax matters that are beyond the subject of the government's intervention. As we have demonstrated, that assumption is incorrect. Because there is no waiver of sovereign immunity exposing the government to such broad relief, there was no reason for Congress in enacting the tax exception to make a point of clarifying that such broad relief would henceforth not be available. Moreover, the language of the tax exception that precludes the broad relief petitioner sought here is sufficiently clear that recourse to the legislative history is neither necessary nor appropriate. See *Burlington Northern R.R. Co.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("[u]nless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete'") (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). See also *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (plain statutory

language is conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters").

Contrary to petitioner's assertion (Pet. 12 n.6), the decision of the Eighth Circuit in *United States* v. *Middle States Oil Corp.*, 18 F.2d 231 (1927), does not contradict this conclusion. That decision did not address the effect of sovereign immunity on a receivership case, and it predates the tax exception to the Declaratory Judgment Act. In short, we are aware of no decision that holds that the tax exception to the Declaratory Judgment Act does not apply in receivership proceedings, and petitioner has not cited any such case.

2. Petitioner contends (Pet. 24) that judicially-created exceptions to the Declaratory Judgment Act should apply to this case. Petitioner did not, however, raise this argument in the court of appeals, and it was not addressed in the opinion. "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (quoting *Duignan* v. *United States*, 274 U.S. 195, 200 (1927)). This is not such a case and, in any event, the argument lacks merit.

The authorities cited by petitioner involve the Anti-Injunction Act, not the Declaratory Judgment Act. The principal authority on which petitioner relies—*Bob Jones University* v. *Simon*, 416 U.S. 725 (1974)—recognized that "[o]nly upon proof of the presence of two factors could the literal terms of § 7421(a) be avoided: first, irreparable injury, the essential prerequisite for injunctive relief in any case; and second, certainty of success on the merits." 416 U.S. at 737 (citing *Enochs*

v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 6-7 (1962)). Under this standard, an injunction may issue only "if it is clear that under no circumstances could the Government ultimately prevail * * * ." *Ibid.* "Only if it is * * * apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." *Ibid.*

In this case, petitioner does not show that irreparable injury would result from the determination of the relevant tax liabilities through the usual procedures provided by law. Nor is there any indication that the government could not prevail upon the merits in the ultimate determination of any such liabilities. There is thus no basis for petitioner's assertion that injunctive relief to bar the ordinary determination and assessment of these liabilities could be warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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